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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL and STATE OF ILLINOIS, a Body Politic and Corporate,

Respondents,

vs.

PERCY WAGNER, et al.,

Defendants,

THOMAS M. BORROWDALE, CAROLINE BORROWDALE, his wife, and GLADYS K. GAVIN,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Now come the petitioners by their Attorneys, Benjamin S. Adamowski, Robert E. Adamowski, Paul D. Newey and Francis X. Riley, who pray that this court issue its Writ of Certiorari to the Supreme Court of Illinois to review the final order of that court, and allege as follows:

REPORT.

1. The opinion of the Appellate Court is reported in 279 N.E. 2d 754. (See Appendix B. attached.) The final order entered pursuant to Rule 315(a) of the Rules of the Supreme Court of Illinois (Ill. Rev. Stat. 1969, Ch. 110A, Par. 315(a)) denied the petitioners' Petition for Leave to Appeal *Board of Junior College* v. *Wagner* (not yet reported) (See Appendix A. attached.)

JURISDICTION.

1. The final order was entered on March 29, 1972.

2. This petition for review of the order of the court below is filed pursuant to Section 1257(3) of Title 28, Judiciary and Judicial Procedure. (28 USCA 1257(3)).

QUESTIONS PRESENTED.

1. When the trial judge has repeatedly said of Record, that these petitioners did not receive fair market value for their land taken, and the compensation ordered, by any measure, is less than one-third of value, have the petitioners been deprived of their property without due process of law as provided in the 14th Amendment, and "without just compensation" as provided in the 5th Amendment?

2. When the public authority taking land produces appraisers who valued 279 scattered lots, as one parcel of property, valued it, and then testified that: (a) it didn't exist as a parcel of land to be developed; and, (b) it couldn't be developed as zoned, plus soil conditions, have the petitioners been deprived of their property without due process of law?

STATEMENT OF THE CASE.

A. Background.

On November 10, 1967, the Petitioner, pursuant to statutory authority, commenced an eminent domain proceeding to condemn 220 lots. On February 5, 1969 it petitioned to condemn another 59 lots. Admittedly, these defendants, *inter alia*, were the owners of them.

In its petitions, it alleged its existence as the Board of Junior College District No. 515, and that it intended to acquire the land for a college site.

On October 29, 1969 the parties entered into a stipulation in which it was agreed, that:

1. The 279 lots "shall be tried as one parcel of property";

2. "There shall be one verdict reflecting full compensation for the taking of said property;" and

3. The date of the taking of all of the lots is November 10, 1967. On that date, the court entered an order consolidating the cases for trial. On November 24, 1969, the jury returned a verdict finding "the just compensation * * * for the taking of their property described in the stipulation * * * to be, one hundred ninety five thousand dollars ($195,000.00)". On that day the court entered a judgment on that verdict.

Pursuant to orders of extension these defendants filed a motion for a new trial on February 24, 1970. The text of the motion is substantially reflected in the "Issues present-

ed for review." On the day it was filed, it was argued, and denied.

In denying petitioners' motion for a new trial, the trial court said, *inter alia*: "I can only say this, that this verdict, I, and I emphasize I, I do not think represented the real cash market value of the property in question. I do not think that the individuals got what this property actually was worth. * * * The reason that I think that the property owners did not get the fair cash market value of the property, * * * I repeat myself, I don't think they got what they should have gotten, but there is nothing I can do about it. The post trial motion will be denied."

B. The Property.

The land in issue is blocks 25 to 40 in Percy Wilson's Broadgate Addition to Arterial Hill, a Subdivision in the East ½ of the Northeast ¼ of Section 17, Township 35, North, Range 14 East. The defendants owned lots in each of these blocks for a total of 279. Of these 279 lots only 35 were single, isolated lots. The 234 abutted each other in not less than pairs, and in block 37 the defendants own 27 of 28 lots, all contiguous. Of the 34 single lots, no less than five of them were more than 35 feet in width.

These blocks are situated in the City of Chicago Heights, at the northwest corner of Halsted Street and Joe Orr Road. They run 2,644 feet (½ mile) north on Halsted from Joe Orr Road to Vollmer Road; and, 1,326 feet (¼ mile) west on Joe Orr Road to Coolidge Avenue.

C. Petitioner's Case.

The petitioner produced two appraisers and a witness for a comparable sale on its case in chief on value.

1. William A. McCann, a real estate broker and appraiser, testified to his qualifications and experience. He appraised this property for the petitioner. He said, it is 8 miles from the south boundary of Chicago and 24 miles from the loop, within the municipal boundaries of the City of Chicago Heights.

The surrounding area, he said, was a "well-integrated community" of shops, industrial plants, homes, schools and forest preserve. It has transportation and highways.

It is a desirable residential area. To the east there is substantial vacant land for industry. To the west there are 1,500 acres of Forest Preserves. It is primarily a single family area of $18,000-30,000.00 homes, 10-20 years of age. North of the property there is substantial vacant land, and also on both sides of Halsted Street. South of the property is a mixture of single family homes, apartments and commercial uses, including the central business district of Chicago Heights.

Referring to the Court's Exhibit No. 1, a plat with these lots marked in yellow, the 24 acres "which is the subject matter of the lawsuit", shows the 279 lots McCann was asked to appraise. Of them, he said, 274 were zoned residential; five on Halsted Street were commercial.

Topographically, the land is rolling, with the high points 23 feet above the low. In the area of blocks 35 to 58, he said there is a high point. In the southern extremity of lots 37 and 38, there is a low point. The lots, he said, are scattered throughout the plat of some 600 lots, which was recorded in 1926. Dedicated streets and alleys abut these lots.

A stream traversing "the property," he said, "affects approximately 16 to 18 of the subject lots." The lots "in close proximity" would have to be tiled and covered over.

"It would have to be treated," he added. In the area abutting the stream, there are peat deposits, which present building problems for foundations.

McCan said he was familiar with the local zoning ordinance in effect in November, 1967. Over objection, he testified that based upon his "understanding" of that ordinance, plus his experience, he was not suggesting that 279 homes could be built on that property. He volunteered his reason for that refusal as the requirements of the ordinance for single family construction, being a 35 foot width and 4,200 square feet in area. Of the 279 lots, he said, only 21 are more than 35 feet wide. His "knowledge and experience," he added, has taught him that a buildable lot is not necessarily a marketable lot. In addition, he said, "The normal desire in this area is 60 foot lots," which exists "on the west side of Coolidge."

Referring to Exhibit No. 1, he suggested, based upon his "knowledge and experience," a resubdivision "of this land" into 60 or 65 foot lots. Evidence of this is shown throughout Exhibit 1, he said. Because he was ignorant of any 30 or 35 foot residential lot built upon in the last twenty years, he said, "the market demand would require a 60 or 65 foot lot."

He also said he had "an opinion as to the highest and best use of the 24 acres as of November, 1967." It would be in accordance with the zoning, single family residence; tempered as to the 16 lots on Halsted for potential commercial development and for the 8 lots along Joe Orr Road for "medium density" housing.

In arriving at that opinion, he considered location and the surrounding single family development "trend." Also, schools, transportation, parks, forest preserve, utilities,

shopping, availability of sanitary and storm sewers and water. He then considered, he said "the scattered location of the lots," the topography and the soil. Again, he added his knowledge and experience.

Assemblage of real estate was familiar to him. It is gathering lots "into one usable, feasible package." To do this, he said: "you would have to go to each separate owner and acquire the property from him."

The witness then testified to a development "between Chicago and Dixie on Joe Orr Road." It is the Olympia Shopping Center. It took a good eight to ten years to build it as it is now.

He had an opinion, he said, as to the fair, cash market value "of the subject 24 acres." It was, $195,000. In so concluding, he considered elements he hadn't considered in arriving at highest and best use. First his "knowledge and experience" in the real estate market in the area; second, "property sales;" third, "the existing market for this property;" fourth, the need for good middle housing; and, fifth, "in general my knowledge and experience in the real estate market."

In considering both highest and best use *and* fair, cash market value, he said, it is important to consider the legal restrictions on the property. "Foremost," of which, "for an appraiser," is zoning.

He was then cross-examined, and said that the last sale he made "in the area," was in 1964 or 1965. It was a mile away and was sold to Shell Oil for a forgotten sum of money. He had also bought a house, five miles away. His memory failed on any recent transactions.

In selling real estate, legal considerations, like zoning, are relevant. He considered the zoning ordinance of 1953 in his valuation opinion, he said. That ordinance has a provision for the vacation of streets and alleys. When vacated the property may be sold to the adjoining owners and they may "be required to pay for that vacation." If that is true in this situation, he said, he didn't know how many acres were involved. His appraisal was on a net basis. He said, he didn't know whether with streets and alleys, the acreage was closer to 24 than to 38.

McCann testified, that under the present ordinance, an owner couldn't build on a 25 foot lot, because it provides for a 35 foot width. He believed, he said, that if a zoning ordinance is adopted subsequent to the purchase, the owner may build on it. However, he said, "this is only part of the consideration I gave it." Marketability must be considered.

The witness conceded that if some of these lots were acquired prior to adoption, they could be used by the owner. He considered that. He examined the title reports, made notes, but didn't have them with him. He believed the lots were acquired in 1955 and 1956, and the ordinance was adopted in 1953.

McCann defined fair, cash market value, essentially as the price a willing buyer will pay a willing seller. A sale under compulsion, he said, lowers the price because the seller can't get sufficient exposure. This affects the price, not the value. In arriving at his opinion here, he did not consider condemnation a force sale. It was not reduced because "they had to sell in the condemnation • • •."

He had been told by local zoning officials, he said, that a plan for a shopping center there had been rejected by

the zoning board. He used that as an element in arriving at his valuation. His opinion, as he testified, was that this was not "an ideal spot" for a shopping center. There is a shopping center less than a quarter mile away. He described it and said it was sufficient for the area. The central business district of Chicago Heights is a half mile away, and although static, has adequate shopping.

McCann said he was familiar generally with land uses, but had not studied them. He described the uses on Halsted generally and the central business area, but said he had not made a retail sales study. On the east side of Halsted across from the property, there is a mixture of residence and shops, behind that, manufacturing and behind that, forest preserve. The property directly across Halsted is zoned commercial. Immediately north of the property it is zoned, business. South of the property is housing, some medium density, some single family. To the west, it is single family.

The witness testified to four grades of shopping centers; regional, community, neighborhood, and central business-type. Regional, he said, largely serving a ten to twenty mile area; community is a major tenant, and satellites; neighborhood differs only in that it doesn't have to have a major tenant, but usually does. Central business is like Chicago Heights. Olympia Plaza is a community type.

McCann thought the small homes in the subdivision to the west were built 10-15 years previously. There were also newer ones beyond, but he did not know how many people lived there. He did not know the population in a 2 to 5 mile area of the property.

He did not consider this property as a shopping center.

He denied that it was correct to say residences are usually developed on arterial highways. The substantial residence development three quarters of a mile north, abuts Halsted Street, he said, but does not face it. It is fenced. North from Washington Park along Halsted it is developed commercially. In addition, there is a substantial amount of vacant land zoned commercial. McCann did not consider any sales of business property approximately a quarter mile from the subject property. He said, the most feasible use of this property would be to develop it as one piece. He said he had sufficient facts to conclude that this property was not for a commercial development.

He believed that this property was first submitted to the zoning board in 1956. It was rejected and twice subsequently submitted to the plan commission and rejected. If the plan had never been submitted to the zoning board, McCann said he had been misinformed.

On redirect examination, he said five of these lots are zoned commercial. Dixie Highway, he said, was a better commercial street than Halsted. His reason for rejecting this property as a shopping center, was because of the "great abundance" of shopping facilities in the area. Moreover, the defendant's large exhibit omits the area of six other, named shopping centers plus strip and business area shops.

McCann said an existing commercial zone is of no aid "in valuing single-family residential sites. It's comparing potatoes to apples," he said. He then elaborated: "A small half-acre, possibly a two-acre commercial sale in relation to a 24-acre residential tract of land, which is a series of scattered lots, there is just—I can't fathom any relationship."

The witness then said that ownership was necessary to an application for rezoning, and that the acquisition "of the other lots," was a condition precedent to doing so. He then recounted the notice requirement of rezoning, then condemning its success, with testimony that was based upon his ubiquitous "experience and knowledge", the rezoning would down-grade the single family properties to the west.

Added to the abundance of existing commercial, McCann again rejected a commercial development here, because of the lack of residential growth potential. With factories, forest preserve and schools, there isn't enough land left to develop residentially to support a commercial development here.

McCann said he did not make soil tests. He could not estimate the amount of land available for residential development in three directions from the property. This area is 5-6 miles from downtown Harvey.

He said, he did not guess at the figure $195,000. "It is a judgment based on 12 years experience and a substantial amount of work and education." He then said:

> "I know the College District 515 made some purchases in the area. I did not value the lots that were zoned commercial at a different price than those that were zoned residential. I did not make any breakdown of the individual lot values of the 279 lots. I testified to a gross figure which was for the total 279. I did not take the value of one lot and multiply it by 279. I did not give the commercial lots a different value than the residential lots. I valued it as a whole. I didn't make any breakdown between commercial and residential lots.

"If I were to value each and every independent lot in that subdivision, I would end up with a total aggregate value less than the amount I have placed on these 279 lots. One of the primary considerations is these 279 lots, even though they are scattered, represent about 47 per cent of the total lots within that area. Now, if you ask me to break down, I will end up with a much lower value than I have given you. I didn't do that. I know I would come up with a lesser figure because the primary consideration was that the 279 lots represent 47 per cent of the ownership, and I know from my experience that when you value independent lots located in an interior location, scattered and not contiguous, that they would be worth less than if you assembled those lots and you do have one ownership of 279 out of 600-and-some lots."

John McNamara was the other appraiser called by the petitioner. He said, he is a real estate broker, appraiser and consultant. He was qualified as a real estate broker, but not as a member of a professional appraiser association, or the appraisal division of a major real estate association. His qualification was that for 15 years he did appraisals. He also has done some building.

He testified that:

"The 24 acres which are the subject matter of this lawsuit are described as follows: This property runs Joe Orr Road to Volmer Road, and from Halsted Street west. It comprises a subdivision that was subdivided back in 1926 and the property is vacant. It is rolling and it runs from a high to a low, a high of 23 feet above grade to a low, which I forget. It's

> traversed with a creek through the center of the property. It has sewer and water adjacent to it for servicing the subject site. It is zoned residential with a small smattering of commercial near Joe Orr Road intersection with Halsted Street."

He had appraised it, "based upon the 43 years experience as to the highest and best use of the subject property." This was as zoned, "the residential with the five commercial lots on Halsted St." In arriving at highest and best use, he considered the property itself, the "amenities" of transportation, schools, churches and shopping centers within walking distance. In addition, he considered "the residential surrounding the property" in all four directions.

Based upon his "43 years experience," zoning "is a key element" in arriving at highest and best use, and in arriving at fair, cash market value. "• • • that is the main factor that you use in arriving at your value."

In McNamara's opinion, the fair cash market value of the 24 acres was $180,000.

On cross examination, he said that his opinion was based upon "what the value of that property would receive if it were exposed on the open market for sale to a willing buyer." It was his opinion of the sales price. He said: "There are no sales comparable to the layout of this property as far as the residential parcels are concerned because of the subdivision."

McNamara elaborated on that statement:

> "It is correct to say that because there are no sales, I used that method of arriving at my estimate of what one would pay for it. What a seller would

> sell it for, what a buyer would pay for it on the layout of the ownership of the so-called 24 acres which is not a contiguous ownership but a disjointed ownership. There are no sales, in my opinion, of individual lots in the area comparable to these lots."

He had no idea of purchases of other lots by the Board. Nor would such sales affect his judgment, because they are "compulsory sales under a condemnation proceeding."

The witness also said he based his opinion of value on: (a) knowledge of the area; (b) "the assemblage of the property under its ownership as described;" and (c) "my experience of 43 years in the real estate business." He guessed at the figures; he made notes, which he didn't have with him. He didn't base it on front footage or square footage. Although five lots were commercial he valued it in its entirety. Whether commercial is worth more than residential is a matter of opinion, he said. He valued it at "what the entire parcel would be worth if it were exposed for sale on the open market."

If sold as individual lots, in his opinion the valuation would be less, "based upon [his] experience." He then said:

> "I cannot tell you anything more than I already testified to which was the basis of my opinion of the $180,000.00 for this property."

On further cross examination, he said: "It is not possible that another use other than the existing use would be the highest and best use of this property."

McNamara said that with reference to the possibility or probability of adapting the site for a shopping cen-

ter, "I don't think you would be able to get financing to finance that." But, assuming financing he did not think it applicable, because of other shopping centers in the vicinity.

His appraisal work for the banks was for mortgage purposes only. In a prolonged cross examination on vacating streets and alleys, McNamara talked abstractly of what would be required. He was assertive, however, that the land reverted upon vacation to the original owner, but not to the subsequent owners.

The petitioner rested.

D. The Respondents' Case.

Thomas M. Borrowdale said he had been a tax consultant for 30 years. He had been a tax analyst who had appeared before the Board of Appeals for many years. He was not a professional appraiser or realtor. He is one of the owners of the property in issue. The land was acquired in 1955.

Defendant's Exhibits A and B were admitted.

Borrowdale said that this land, consisting of 603 lots, had to provide for the runoff of the 300 acres to the west of it. The drainage problem he said would be very costly. He had made an extensive study of the land and its surroundings, with the engineer at the City of Chicago Heights. Because the land was saddled with this great drainage cost, Borrowdale conceived the idea in 1959 of developing the whole tract. At the time most of the buildings to the west had been built, as had a little service center on Joe Orr Road.

The defendant also made a traffic study. Halsted Street was a 100 feet wide thoroughfare; Joe Orr Road was an 83 feet wide unpaved road, which when developed would be a 100-feet wide thoroughfare. Coolidge Avenue was a 66-feet wide street. The Calumet Expressway was 3 miles to the east; the Tri-State, three miles to the north; I57, 3 miles west, and Highway 30 one and a half miles south.

There were no regional shopping centers in existence at the time, and the Chicago Heights business district had deteriorated, and the city needed income, he said. In 1962, he sent a man to St. Louis to try to attract triple A merchants (Wards, Sears) to come into the area. At the time there were many vacant stores in Chicago Heights and the apartments above them were vacant. In 1966, he gave this data plus a year's study, and a loss and cost comparison between this plan and proposed urban renewal. The difference was an income of $450,000 from the shopping center against a $150,000 loss on urban renewal of the central business district.

The witness said he made a population study. He made a traffic flow study. In 1962, there were 20,000 cars every 24 hours on Halsted Street, and two-thirds of that on Joe Orr Road. He described the area as: The east side of Halsted Street all zoned commercial, and several pieces developed as such; north, there is a gas station and wash-stand; on the southeast corner of this property there is a gas station; on the southwest corner of the property, there is a fire station; there is a multiple housing development on Joe Orr Road on the south, on Riele more commercial development. The predominant use south of Joe Orr on Halsted is mostly commercial, as is Halsted Street on both sides to the north.

Mortgage people informed Borrowdale that they required 65 per cent triple A tenants and 35 per cent local tenants for financing. So part of his plan was a shopping center. (He said, in 1963, he and others (we) owned 321 of 587 lots. The balance to 603 was the 16 lots for the gas station and fire station.)

Borrowdale inquired of other owners of the lots, whether they would sell for a dollar a square foot, or take an interest in the planned development at two dollars a square foot, and some of them chose the latter. It was "a reasonable probability" that this land could be acquired, he said.

The highest and best use of the entire tract would be a regional shopping center. Because of the enormous drainage problem, defendant said, the city officials indicated they would change the zoning, if it could be developed as one tract. Borrowdale's opinion of the fair, cash market value of this land "was in excess of $50,000 an acre."

On cross examination the defendant said Exhibit D was "my plan." Part of the exhibit is a prospectus. It was submitted over the names of Borrowdale, Lovelace and Gavin, as part owners, and Borrowdale, as developer.

On redirect Borrowdale said, there are 29 acres of dedicated, but undeveloped streets and alleys in the entrire tract, 21 of these are in the interior. "Our 279 lots * * * would consist of 24 acres of actual lot size, plus 14 acres of additional half-streets and half-alleys * * *," he said.

Richard L. Hoekstra, who is a real estate broker and appraiser, said that "the highest and best use of this property would be a combination of either commercial

plus multi-unit dwellings or all commercial or all multi-unit dwellings." He added:

> "Based upon my experience as a broker and as an appraiser, I have an opinion as to the market value of this property for that particular purpose.
>
> I have based my figures on values along Halsted Street which have run as low as $200 a foot and as high at the south end up to $400 or $450 per foot and along Joe Orr on the basis of about $200 to $250 per foot, and the inside land to be used as its highest and best use at about one dollar a square foot, which would average about $1.10 per square foot the entire 80-acre plot.
>
> I base that on the fact the property is now served by water and sewer on the east and water and sewer on the west and by water only—or on the south, rather, and water only on the west line.
>
> I have an opinion as to the value of the 24 acres of property. You multiply the amount of acres by $1.10, by 43,560, to arrive at about $48,000 per acre. That multiplied by 24 would be $1,150,000.
>
> I have testified before zoning bodies with reference to the zoning of properties.
>
> In my opinion, the highest and best use of the property would be for a shopping center or commercial coupled with some multiple dwellings."

On cross examination, he said he had lent money to Borrowdale in the past on this property. It was repaid. The cross examination brought out that the valuation by Hoekstra would be different, if this were a 24 acre tract vis-a-vis "279 lots strewn out on 80 acres." Nor could Hoekstra point out "what property is owned by Borrowdale or what property is owned by the other 150 owners." He also admitted that it would take "money and patience"

to assemble the "91 separate instances of breakage." He admitted a 15-story apartment with two apartments to a floor "sounds highly unusual." He conceded that attempted rezoning would run "into some resistance," as there is to every zoning change. If rezoning were denied, Hoekstra said it would radically change his figures, "because you can only use four lots per acre under the present zoning."

His market figure, he said, was based upon: (a) developing the entire tract; and (b) rezoning.

Lovelace testified, as "one of three owners of the 279 lots." He said the property was worth, as residential, an average price of $3,000 per lot. This postulates doubling up lots. On cross examination, he said he knew of nowhere in Chicago Heights where you could buy a comparable building site for less than $6,000.

E. Jurisdictional Statement.

The motion for a new trial was voluminous, based upon the conduct of the trial, the confusion attending what was being condemned, and inadequacy of the condemnor's evidence, and the obvious failure of the jury to give these Petitioners just compensation, as defined in both the state and Federal constitutions. In denying the motion the trial court stated three times, that the jury did not give these petitioners fair cash market value as just compensation.

The Appellate Court in its opinion ignored that fact, (see Appendix B) and the State Supreme refused to recognize that failure, when it denied leave to appeal. (Appendix A) This is the final state order. (Ill. Rev. Stat. 1971, Ch. 110A, Rule 315.)

ARGUMENT.

I.

THE PETITIONERS WERE DEPRIVED OF THEIR PROPERTY, WITHOUT DUE PROCESS OF LAW, WHEN THE COURTS OF ILLINOIS ADMITTEDLY LET THEIR PROPERTY BE TAKEN "WITHOUT JUST COMPENSATION."

"The only issue to be tried by the jury is the amount of compensation to be awarded." *Board of Education* v. *City of Chicago,* 402 Ill. 291, 298. "• • • just compensation in a full taking under Illinois law of eminent domain is: (1) fair, cash market value of the property; (2) at, and for, its highest and best use; (3) on the date the petition to condemn is filed." *Valuation Problems,* Foran, 1966 *Law Forum 69*; *Department of Public Wks.* v. *Hufeld,* 68 Ill. App. 2d 120, 127. The court below repeatedly stated in denying a motion for a new trial, that the jury in this case did not reach that value. It said: (1) "I do not think that the individuals got what this property was actually worth;" (A. 115) (2) "The reason that I think the property owners did not get fair cash market value of the property, • • •;" (A. 116) and (3) "I repeat myself, I don't think they got what they should have gotten, • • •."

The Federal Constitution (Fifth Amendment) applies the same rule.

> "The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And "just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily

> as he would have occupied if his property had not been taken. In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time of taking. *United States* v. *Reynolds,* 397 U.S. 14, 15-16.

And, that rule, through the Fourteenth Amendment, applies to the States. *Foster* v. *City of Detroit,* (E.D. Mich.) 254 F. Supp. 655, 661; affirmed, 405 F. 2d 138, 144.

Admittedly here, repeatedly, the trial Court held that these petitioners had not received fair market value. They did not, therefore, receive just compensation. Since they did not receive just compensation, they have been deprived of their property without due process of law. *Foster,* 405 F. 2d at 144.

Moreover, the denial of due process is compounded here by the duplicity of the witnesses who received public money from the condemnor, then valued a non-existent piece of land, consisting of lots which were valueless. "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' ". *U. S.* v. *Virginia Electric Co.,* 365 U.S. 624, 631.

The failure of this condemning body to evoke the word "just" is patent from the testimony of its two appraisers.

A. Appraisals of a Non-Existent Tract of Land.

In the first instance, neither McCann nor McNamara for petitioner knew what he was appraising. McCann referred to "the lots I was asked to appraise." He then testified to the value "of the subject property, 24 acres * * *." But, the 24 acres could only be used under "one ownership * * * not as scattered parcels." Nor could a

comparable sale be considered in making his valuation, because there is nothing else "in relation to a 24-acre residential tract of land, which is a series of scattered lots • • •." And yet, he did not make a breakdown of "individual lot values." He did not "value one lot and multiply it by 279." He just came up with "a gross figure," not on lots of no individual value, but on a non-existent 24 acres of land which is valueless.

McNamara, when it came to the land he appraised, valued "The 24 acres" from "Joe Orr Road to Vollmer Road, and from Halsted Street west." That is 80 acres. He appraised "the 24 acres." But, it really didn't have any value to McNamara, because it didn't exist. He couldn't arrive at market value based upon "what a seller would sell it for, what a buyer would pay for it on the layout of the ownership of the *so-called 24 acres* which is not a contiguous ownership, but a disjointed ownership."

B. The Lots Are Valueless.

McCann said the highest and best use of the lots was as presently zoned "predominant single residential." But, he said they can't be used for that purpose, because (a) of a water-course and peat deposits which create "foundation problems for building purposes;" (b) the lots do not conform to the zoning ordinance in width and square foot requirements; and, (c) even if they could overcome those two obstacles they "would not be marketable." Nor did the 24 acres have any value, since McCann couldn't fathom value of "a 24-acre residential tract of land which is a series of scattered lots." Moreover, rezoning was out of the question, because they would first "have to acquire all of the other lots."

The thrust of the foregoing is that McCann's and McNamara's testimony on value was as competent as the next person's. *Dept. of Pub. Wks.* v. *Bohne,* 415 Ill. 253, 264. But, the fatal defect in the petitioner's case was that it qualified both of them as experts, who admittedly had no expertise in valuing "so-called 24 acres," or "a 24-acre residential tract of land, which is a series of scattered lots • • •." *City of Chicago* v. *Geo. F. Harding Collection,* 70 Ill. App. 2d 254, 272. Since, neither man valued a lot, a parcel, a tract of land or a unit of marketable land of any kind, the guess each made at the fair, cash market value of a non-existent, non-improvable and non-marketable tract of land was essentially nonsense. It thoroughly confused the jury, who really chose one of two arbitrary figures, but never was given a chance to arrive at the fair cash market value of 279 lots with a measurable market value.

As this Court said in *Virginia Power,* "The result contended for by the government would hardly comport to those standards." 365 U.S. at 631. Here, the government is not merely passively perverting the standards of fairness and equity, it has affirmatively evaded them.

CONCLUSION.

Wherefore, the petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

Benjamin S. Adamowski
Francis X. Riley
Paul D. Newey
Robert E. Adamowski
Counsel for Petitioners

APPENDIX A

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT

March 29, 1972

Adamowski, Newey & Riley
Attorneys at Law
1 No. LaSalle St.
Chicago, Illinois 60602

No. 44962—Board of Junior College District No. 515, Counties of Cook and Will, etc., respondent, vs. Percy Wagner, et al., (Thomas M. Borrowdale, et al., etc., et al., petitioners). Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today *denied* the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Justin Taft
Clerk of the Supreme Court

APPENDIX B

Mr. Justice Schwartz delivered the opinion of the Court.

This is an appeal by defendants-appellants from a judgment on a verdict in a condemnation suit awarding the sum of $195,000 to defendants. On November 10, 1967, petitioner commenced this proceeding to condemn certain property in the City of Chicago Heights. The property consisted of 24 acres of vacant land within an 80-acre tract bounded on the east by Halsted Street, on the south by Joe Orr Road, on the west by Coolidge Avenue and on the north by Vollmer Road. In 1926 a plat of subdivision of the entire 80-acre tract was filed. Included within the tract were dedicated but unimproved streets and alleys. The 24 acres of land owned by defendants are composed of 279 lots scattered throughout the subdivision. On October 29, 1969 the parties stipulated that the lots "shall be tried as one parcel of property" and that a single verdict and judgment covering compensation for the whole should be rendered. It was also stipulated that the value should be determined as of November 10, 1967. The jury verdict fixed the value at $195,000 and judgment was entered thereon. Defendants appealed, contending that they are entitled to a new trial because (1) the fair cash market value of the property was not established by competent evidence, (2) incompetent, irrelevant and immaterial evidence on zoning was admitted, (3) the evidence does not establish the amount of land involved, and (4) the defendants were prejudiced by inflammatory and misleading remarks in the petitioner's final argument to the jury. A summary of the evidence follows.

(Opinion)

William McCann and John McNamara testified as valuation experts on behalf of petitioner. Both stated that the highest and best use of the subject property was for predominantly single-family residential development. McCann, a licensed real estate broker and appraiser, testified that in his opinion to fair cash market value of defendant's lots as of November 10, 1967 was $195,000. In reaching these conclusions as to the highest and best use and market value, McCann considered the location of the property and the trend toward single-family residences in the surrounding area, the abundance of shopping nearby the availability of schools, transportation, sanitary and storm sewers, topography of the land, soil conditions and the scattered location of the lots. In addition he noted that most of the lots owned by defendants did not have the minimum 35-foot width required by the existing zoning ordinance for single-family residential development and that in any event the market demand in the area would require a 60 to 65 foot width. McNamara valued the property at $180,000 based on his knowledge of the area, the assemblage of the property as a single parcel and his experience in real estate matters.

Defendants presented evidence of the value of the property based primarily on its potential for development under a change in zoning to a less restrictive use. The value of the property as a site suitable for commercial development was set by several expert witnesses at well over a million dollars. In support of this theory the defendants presented evidence that there was a reasonable probability of a zoning change in the near future. Walter Lovelace, one of the owners of the property, testified that even under the existing residential zoning the property

was worth an average of $3000 per lot. We proceed to consideration of defendants' first point, that the fair cash market value was not established by competent evidence.

The competency of a valuation witness in a condemnation proceeding is established by a showing that he is acquainted with the property involved. *Department of Public Works & Bldgs.* v. *Oberlaender,* 42 Ill. 2d 410, 247 N.E. 2d 888; *Department of Public Works & Bldgs.* v. *Bohne,* 415 Ill. 253, 113 N.E. 2d 319. In the instant case two appraisers testified on behalf of the petitioner as to the value of the 279 lots considered as one parcel. Both witnesses based their opinions on their knowledge of the area, the location and size of the lots, the applicable zoning ordinance and their judgment of developmental trends in the area. Mc Cann placed a value of $195,000 on the property and McNamara valued it at $180,000. Defendants did not object to the competency of either witness at trial. We conclude that the verdict of the jury setting compensation at $195,000 is supported by competent evidence.

Defendants contend that the trial record is replete with incompetent, irrelevant and immaterial evidence. They argue that the proper measure of value is the highest and best use of the land "regardless of zoning," and that in any event petitioner's valuation witness McCann was not qualified to testify as to the probability of rezoning. It is now well settled that the jury may consider the reasonable probability of a zoning change in determining the highest and best use of property. *Department of Public Works & Bldgs.* v. *Rogers,* 39 Ill. 2d 109, 233 N.E. 2d 409; *Lombard Park Dist.* v. *Chicago Title & T. Co.,* 103

Ill. App. 2d 1, 242 N.E. 2d 440; *Park Dist. of Highland Pk.* v. *Becker,* 60 Ill. App. 2d 463, 208 N.E. 2d 621. Moreover, valuation witnesses such as McCann are competent to testify as to those "factors" which would inform a jury of the likelihood of a zoning change in the near future. *Lombard Park Dist.* v. *Chicago Title & T. Co., supra.* In the instant case the defendants' theory in the trial court was that the lots in question could be developed more profitably under a different zoning classification. Of the 279 lots in the tract, five were zoned commercial and the rest were zoned residential at the time the condemnation petition was filed. At the trial the defendants argued that the highest and best use of the property would be either commercial plus multi-unit dwellings or all commercial or all multi-unit dwellings. Whenever a property owner seeks to introduce evidence of value based on a use of property inconsistent with the prevailing zoning classification, he must first establish the reasonable probability of a rezoning within the near future or the court will exclude all evidence and opinions of value based on a use permitted only by a probable rezoning. *Lombard Park Dist.* v. *Chicago Title & T. Co., supra.* We conclude that zoning was an important factor for the jury to consider in determining the fair cash market value of the 279 lots at their highest and best use and that McCann was competent to testify as to those factors which relate to the probability of rezoning.

Defendants also contend that the evidence does not establish the actual size of the property involved. They argue that while the 279 lots total approximately 24 acres, dedicated "half-streets and alleys," so-called, abutting the lots total 14 additional acres and should also have been

considered by the jury in determining value. The evidence established that these streets and alleys did exist within the site and that they would have to be vacated before they could be developed. The testimony was in conflict as to the importance to be attached to these "half-streets and alleys" and with the evidence in that state, the issue was presented to the jury. The existence of conflicting evidence in a case does not constitute grounds for reversal. While defendants characterize this conflicting evidence as relating to the size of the property condemned, no such conflict exists at the trial. The property condemned covered 24 acres, the value of which would have been affected by the existence of dedicated streets and alleys. Conflicting opinions as to the importance of that evidence with respect to the value of the property was resolved by the verdict of the jury.

Defendants contend that the trial court erred in admitting the testimony of petitioner's rebuttal witness, Robert Olson. Olson testified that as a city planner for Chicago Heights he assisted in the preparation of a comprehensive plan which was submitted to the city. That plan recommended that the area in which the property here involved is located be used for residential development. Although Olson originally testified that the plan was accepted by the City in the summer of 1967, defendants established that it was accepted by the City Council on June 24, 1968. The date the defendants' property was to be valued was stipulated to be November 10, 1967.

There was no objection to Olson's testimony however nor did defendants move to strike it. They did object to

the admission of the comprehensive plan and it was not admitted. Moreover, Olson also testified, without objection, that Borrowdale, one of the defendants, had presented a plan for a shopping center to the Planning Commission prior to the adoption of the comprehensive plan and that the proposed project was rejected by the Commission. Under these circumstances Olson's testimony was proper since the defendants chose to base their case on the contention that there was a reasonable probability that the property would be rezoned.

Defendants' final contention is that petitioner's counsel deprived them of a fair trial by an inflammatory closing argument. No objection was interposed to any of the alleged inflammatory language. We have examnied petitioner's closing argument however and find that it did not exceed the bounds of fair comment.

The judgment of the trial court is affirmed.

Judgment affirmed.

DRUCKER and LORENZ, J. J. concur.

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Supreme Court, U. S.
FILED
JUL 30 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1704

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL and STATE OF ILLINOIS, a Body Politic and Corporate,

Respondent,

vs.

PERCY WAGNER, et al.,

Defendants,

THOMAS M. BORROWDALE, CAROLINE BORROWDALE, his wife and GLADYS K. GAVIN,

Petitioners.

BRIEF IN OPPOSITION OF RESPONDENT, BOARD OF JUNIOR COLLEGE DISTRICT 515, COUNTIES OF COOK AND WILL, STATE OF ILLINOIS.

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Petitioners.

BRIEF IN OPPOSITION OF RESPONDENT BOARD OF JUNIOR COLLEGE DISTRICT 515, COUNTIES OF COOK AND WILL, STATE OF ILLINOIS

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent prays that a writ of certiorari be denied.

QUESTIONS PRESENTED.

The Petitioners' statement of Questions Presented is not satisfactory and accordingly the following statement of questions presented herein is submitted:

1. When the trial of a state eminent domain case is conducted by one attorney, and after verdict and judgment another attorney substitutes for the attorney who conducted the trial, and thereafter the trial judge comments during the hearing on a motion for new trial that in his *opinion*, if a different theory and other evidence had been presented in the trial of the case, a higher verdict *might* have resulted, does such comment by the trial court constitute the basis of a claim of deprivation of just compensation or due process under the Fifth and Fourteenth Amendment?

2. Can there be a deprivation of just compensation under the Fifth and Fourteenth Amendments in a state eminent domain proceeding, when judgment is entered on the verdict of a jury, which verdict was within the range of the testimony, after jury view and in accordance with legally competent evidence, and when thereafter the same argument presented here was made to the Appellate Court and to the Supreme Court of the state, and the Appellate Court affirmed the judgment below and the Supreme Court denied leave to appeal?

SUPPLEMENTAL STATEMENT OF THE CASE.

The following additions and comments are submitted to correct inaccuracies and omissions in petitioners' Statement of the Case:

A. Background

At pages 3 and 4 of the Petition, the petitioners fail to state that there was a substitution of attorneys for the defendant-petitioners between the judgment on the verdict and the filing of a motion for a new trial.

Petitioners' counsel here substituted as counsel in the trial court *after* the trial, verdict and judgment below, and participated in the trial court proceedings *only* as to the post-trial motion. The argument of this counsel on the post-trial motion revealed that he was either unaware of, or wholly misconstrued the facts and theories of the case *as presented in the trial.*

The three specific comments which the defendants quote are taken wholly *out of context*. In the course of the statement the trial judge stated that it was his *opinion* that the theory of the case advanced by the defendant in the trial was not the best that could have been advanced and that in his *opinion*, if the owner had introduced *other* evidence of value, he believed that a higher verdict *might* have resulted. The trial court recognized these comments for what they were—pure opinion and speculation on his part. Thus, the trial court carefully and explicitly qualified the comments with introductory phrases, and which appear at Abstract page 115:

> "I, *and I emphasize I*, do not think . . ." (Emphasis added.)
>
> ". . . in my opinion, *and I emphasize my opinion* . . ." (Emphasis added.)

And as the court explicitly stated with respect to what the result *might* have been if another theory and other evidence hand been used:

"I *think* they would have gotten . . . more money . . ." (A. 117; R. 434.) (Emphasis added.)

C. Petitioners' Case.

At pages 4 to 15 of their Petition, the petitioners fail to state that *there was no objection to the testimony of the respondent's witnesses McCann and McNamara in the trial of the case.*

D. The Respondent's Case.

At pages 15 and 16, petitioners fail to state that the witness Borrowdale testified that he had acquired the property after tax searches which indicated that most of the lots were tax delinquent. Also, that he testified to a value of the property *if all 603 lots in the subdivision were assembled.* (A. 69-80)

At page 19, petitioners fail to state that the witness Lovelace testified that a lot which is not buildable is not of great value and that he didn't compute the number of buildable sites in the property in question. (A. 92)

At page 19, petitioners fail to note that another witness was presented who admitted he had been hired three hours before he testified.

E. Jurisdictional Statement.

At page 19, under the above title, the petitioners state that the Illinois Appellate Court and Supreme Court ignored or refused to recognize the *alleged* statements of the trial court which petitioners assert herein. Petitioners fail to note that these "*statements*" were the major point of the arguments in the Appellate and Supreme Court. It is ridiculous to assert that the matter was not thoroughly considered by the higher Illinois Courts.

ARGUMENT.

THE STATE COURT PROCEEDINGS BELOW PRESENT NO FEDERAL QUESTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND NO DETERMINATION IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The essence of the Petitioners' argument herein is that it was denied just compensation in a state eminent domain proceeding. It attempts to support this assertion on the basis of *alleged* comments of the trial judge made after the hearing on the motion for a new trial, and on *alleged* incompetence of the respondent's valuation witnesses.

Re the Alleged Trial Court Comments.

The petitioners' attempt to support their assertion of an inadequate award by quoting *out of context*, certain statements of the trial judge *after the arguments on the post-trial motion.*

In order to place this matter in context, it is first to be noted that counsel for petitioners herein was *not* the same attorney who represented the defendants *in the trial of the case.* Petitioners' counsel here substituted as counsel in the trial court *after* the trial, verdict and judgment below, and participated in the trial court proceedings *only* as to the post-trial motion. It was clear from the argument of this counsel on the post-trial motion, that he was either unaware of, or wholly misconstrued the facts and theories of the case *as presented in the trial.*

From just a cursory reading of the *entire* statement of the trial court is is abundantly clear that the trial judge in making the statement was explaining to defendants' counsel (who had not participated in the trial) why the verdict was proper under the evidence and theories of the case as tried below (A. 117-118).

The three specific comments which the defendants quote are taken wholly *out of context*. In the course of the statement the trial judge stated that it was his *opinion* that the theory of the case advanced by the defendant in the trial was not the best that could have been advanced and that in his *opinion*, if the owner had introduced *other* evidence of value, he believed that a higher verdict *might* have resulted. That the trial court recognized these comments for what they were–pure opinion and speculation on his part, is abundantly clear from his very carefully worded remarks. Thus, the trial court carefully and explicitly qualified the comments with introductory phrases, and which appear at Abstract page 115:

> "I, *and I emphasize I*, do not think . . ." (Emphasis added.)
>
> ". . . in my opinion, *and I emphasize my opinion* . . ." (Emphasis added.)

And as the court explicitly stated with respect to what the result *might* have been if another theory and other evidence hand been used:

> "I *think* they would have gotten . . . more money . . ." (A. 117; R. 434.) (Emphasis added.)

Thus it is clear that the subject comments in no respect support the petitioners' assertion that the trial judge felt the jury verdict was inadequate in amount or improper. Quite to the contrary, the denial of the post-trial motion establishes conclusively that the trial court did not consider the verdict inadequate or improper. As stated above, the true meaning of the comments *in context* was that the trial judge was expressing his *opinion* that a higher award *might* have resulted *if the defendants had presented a different theory of the case and evidence*.

The propriety of the trial court's ruling in denying a new trial under such circumstances cannot be subject to question. It has long been established in the law that a trial court has no discretion to interfere with the verdict of a jury which is

consistent with the evidence as presented in the case. In *Buer* v. *Hamilton*, 48 Ill. App. 2d 171 the trial judge had granted a new trial based upon the fact that he felt the award of damages could or should have been larger. In reversing, the court succinctly stated at page 175:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions *or because judges feel that other results are more reasonable. Tennant* v. *Peoria and P. U. Ry Co.*, 321 U.S. 29, 88 L. Ed. 520; *Stilfield* v. *Iowa-Illinois Gas & Elec. Co.*, 25 Ill. App. 2d 478, 167 N. E. 2d 295; *Dowler* v. *New York Cent. & St. L. R. Co.*, 5 Ill. 2d 125, 125 N. E. 2d 41; *Pitrowski* v. *New York Cent. & St. L. R. Co.*, 4 Ill. 2d 125, 122 N. E. 2d 262.
>
> "Unless the finding of the jury on a question of fact is . . . unreasonable, arbitrary and unsupported by the evidence, . . . *the finding of the jury is binding upon the court under the facts. Stilfield* v. *Iowa-Illinois Gas & Elec. Co.*, 25 Ill. App. 2d 478, 490, 167 N. E. 2d 295." (Emphasis added.)

This principle has been consistently applied under the Illinois law of eminent domain. While the cases in this regard are legion, particularly *apropos*, in light of petitioners' argument herein, is the case of *F. P. D.* v. *Collins*, 348 Ill. 477, where the court stated at page 484:

> *"Appellant insists that the verdict is too low, and that it was the result of confusion, prejudice and passion of the jury.* In cases of this kind, where the evidence is conflicting and the verdict is within the range of the testimony, *courts will not interfere with the finding of the jury* as to the amount of damages . . . (*City of Chicago* v. *McGowan*, 324 Ill. 164; *Forest Preserve District* v. *Barchard*, 293 F. 2d 556). The jury viewed the premises and saw the witnesses who testified and they were better able to weigh the evidence than is this court." (Emphasis added.)

Re Respondent's Witnesses.

In its argument titled "non-existent tract" and "lots are valueless" (Pet. for Writ, pp. 21-23) the petitioners assert that the opinions of the valuation witnesses were not legally competent. As noted above in the statement of the case, *no objection was made to the competence of the witnesses or their opinions of value in the trial of the case.* Under Illinois law, no error can be assigned on appeal in the absence of objection in the trial court. (*F.P.D.* v. *Kercher*, 394 Ill. 11).

Re Federal Question.

The petitioners cite no authority (and indeed none exists) in support of the proposition of a denial of due process under the Fourteenth Amendment incident to a state rule of law involving the competence of valuation evidence, or the findings of fact of a state court jury in an eminent domain proceeding. Moreover, the ruling of the trial court in denying the motion for new trial and the decisions of the Illinois Appellate and Supreme Court in confirming the judgment on the verdict are wholly consistent with the established principle that judges are not free to reweigh evidence and set aside jury verdicts merely because the jury could have drawn different inferences or conclusions or reached other results which judges might deem more reasonable. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944). The Fourteenth Amendment does not impose a standard for state judicial proceedings different from that applied in Federal judicial proceedings.

It is fundamental that due process in its *procedural* aspect involves matters of the sufficiency of notice, opportunity to be heard and customary proceedings, and that mere error or irregularity in proceedings are not a denial thereof (*Am. Ry. Express Co.* v. *Kentucky*, 273 U.S. 269 [1927]; 16 Am. Jur.2d, Sec. 548.) In its *substantive* aspect, due process involves freedom from arbitrary and discriminatory state action.

(*Snowden* v. *Hughes*, 321 U.S. 1 [1944]; *Am. Ry. Express Co.* v. *Kentucky, supra*; 16 Am. Jur. 2d, 550.) No contention of "unfair" procedural aspects of the proceedings below is presented herein, nor of arbitrary or discriminatory action of state officials. Rather, petitioners merely complain of the result of a jury verdict and assert error or irregularity in judicial proceedings. Accordingly, no Federal question of due process violation under the Fourteenth Amendment is presented herein.

It is submitted that there is no basis in law or fact for the assertion of a violation of the Fourteenth Amendment incident to the state court proceedings herein.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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